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Supreme Court of the United States,

OCTOBER TERM, 1904.

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THE PEOPLE OF THE STATE OF NEW YORK, EX REL. THE CONSOLIDATED GAS COMPANY OF NEW YORK,
Plaintiff-in-Error,
against
THE STATE BOARD OF TAX COMMISSIONERS.
No. 77.

Error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFF-IN-ERROR.

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Brief for Plaintiff-in-Error.

Statement of the Case.

This case involves the validity and constitutionality of the so-called special franchise law of the State of New York, chapter 712, Laws of 1899, which was approved on May 26, 1899, and went into effect on October 1, 1899. This law amended the general tax law (chapter XXIV., General Laws of New York) to provide for the assessment for taxation of franchises in the streets, highways or public places which had not previously been taxed. To effect this purpose, section 1 of the Act of 1899 amended sub-division 3 of section 2 of the tax law to read as follows, the matter added by the Act of 1899, by way of amendment to the law as it formerly read, being underscored:

> "3. The terms 'land,' 'real estate,' and 'real property,' as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected

upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and enclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through streets, highways, or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the state. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any

street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax."

Section 2 of the Act of 1899 added to article II. of the Tax Law six new sections, numbered 42 to 47, inclusive. Section 42, added to the Tax Law by the Act of 1899, was amended by chapter 254 of the Laws of 1900, which was approved and became a law on March 29, 1900. This section, as so amended, so far as here material, read as follows:

"Section 42. Assessment of Special Franchises.—The state board of tax commissioners shall annually fix and determine the valuation of each special franchise subject to assessment in each city, town, or tax district. After the time fixed for hearing complaints, the tax commissioners shall finally determine the valuation of the special franchises, and shall file with the clerk of the city or town in which said special franchise is assessed a written statement duly certified by the secretary of the board of the valuation of each special franchise assessed therein as finally fixed and determined by said board; such statement of valuation shall be filed with the town clerk of the respective towns within thirty days next preceding the first day of July in each year; and with the clerks of cities of the state within thirty days before the date set opposite the name of each city in the following schedule. In the city of New York, such statement shall be filed with the department of taxes and assessments:

"Schedule of Dates for Filing of Assessments of Special Franchises.

New York City..... .....May 1.

".....The valuations of every special franchise as so fixed by the state board shall be entered by the

assessors or other officers in the proper column of the assessment-roll before the final revision and certification of such roll by them, and become part thereof with the same force and effect as if such assessment had been originally made by such assessor or other officer * * * * The valuation so fixed by the state board shall be the assessed valuation on which all taxes based on such special franchise in the city, town or village for state, municipal, school or highway purposes shall be levied during the next ensuing year."

Section 43, added to the tax law by the Act of 1899, so far as material, reads as follows:

"Section 43. Report to State Board of Tax Commissioners.—Every person, copartnership, association or corporation subject to taxation on a special franchise, shall, within thirty days after this section takes effect, or within thirty days after such special franchise is acquired, make a written report to the state board of tax commissioners containing a full description of every special franchise possessed or enjoyed by such person, copartnership, association or corporation, a copy of the special law, grant, ordinance, or contract under which the same is held, or if possessed or enjoyed under a general law, a reference to such law, a statement of any condition, obligation or burden imposed upon such special franchise, or under which the same is enjoyed, together with any other information relating to the value of such special franchise, required by the state board. The state board of tax commissioners may from time to time require a further or supplemental report from any such person, copartnership, association or corporation containing information and data upon such matters as it may specify. Every report required by this section shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the association or corporation or one of the persons or one of the members

of the copartnership making the same, to the effect that the statements contained therein are true."

Section 44, added to the tax law by the Act of 1899, read as follows:

"Section 44. Hearing on Special Franchise Assessment.—On making an assessment of a special franchise, the state board of tax commissioners shall immediately give notice in writing to the person, copartnership, association or corporation affected, stating in substance that such assessment has been made, the total valuation of such special franchise, and the valuation thereof in each city, town, village or tax district; and that the board will meet at its office in the city of Albany on a day specified in such notice, which must not be less than twenty nor more than thirty days from the date of the notice, to hear and determine any complaint concerning such assessment. Such notice must be served at least ten days before the day fixed for the hearing; and it may be served on a copartnership, association or corporation, by mailing a copy thereof to it at its principal office or place of business and on a person, either personally or by mailing it to him at his place of business or last known place of residence. Section thirty-six of this chapter applies so far as practicable to a hearing by the state board of tax commissioners under this section."

Section 36 of the general tax law, to which reference is made in new section 44 above quoted, relates to the hearing of complaints by local assessors, and reads as follows:

"Section 36. Hearing of complaints.—The assessors shall meet at the time and place specified in such notice, and hear and determine all complaints in relation to such assessments brought before them, and for that purpose they may adjourn from time to time. Such complainants shall file with the assessors a statement, under oath, specifying the respect in which the assessment complained of is incorrect, which verification must be made

by the person assessed or whose property is assessed, or by some person authorized to make such statement, and who has knowledge of the facts stated therein. The assessors may administer oaths, take testimony and hear proofs in regard to any such complaint and the assessment to which it relates. If not satisfied that such assessment is erroneous, they may require the person assessed, or his agent or representative, or any other person, to appear before them and be examined concerning such complaint, and to produce any papers relating to such assessment with respect to his property or his residence for the purpose of taxation. If any such person, or his agent or representative, shall wilfully neglect or refuse to attend and be so examined, or to answer any material question put to him, such person shall not be entitled to any reduction of his assessments. Minutes of the examination of every person examined by the assessors upon the hearing of any such complaint shall be taken and filed in the office of the town or city clerk. The assessors shall, after said examination, fix the value of the property of the complainant and for that purpose may increase or diminish the assessment thereof."

Section 45, added to the tax law by the Act of 1899, was amended by chapter 254 of the Laws of 1900, which was approved and became a law on March 29, 1900. This section as so amended provides for the review of assessments of special franchises made by the State Board of Tax Commissioners by a writ of certiorari running to the State Board of Tax Commissioners, and provides also for a notice to the owner of the special franchise of the final assessment.

Section 46, added to the tax law by the Act of 1899, provides for the deduction from the tax on a special franchise of any sum in the nature of a tax based upon a percentage of gross earnings which has been paid by the owner of the special franchise to the city or town within the next preceding year.

Section 47, added to the tax law by the Act of 1899, reads as follows:

> "Section 47. Special franchise tax not to affect other tax.--The imposition or payment of a special franchise tax as provided in this chapter shall not relieve any association, copartnership or corporation from the payment of any organization tax or franchise tax or any other tax otherwise imposed by article nine of this chapter, or by any other provision of law; but tangible property subject to a special franchise tax situated in, upon, under or above any street, highway, public place or public waters, as described in subdivision three of section two shall not be taxable except upon the assessment made as herein provided by the state board of tax commissioners."

Section 3 of the Act of 1899 amended sections 21 and 31 of the general tax law by requiring local assessors to insert in their assessment rolls an additional column to contain the value of special franchises as fixed by the State Board of Tax Commissioners.

The relator is a corporation of the State of New York doing business as a gas company. The corporation was formed in 1884 by the consolidation of six gas companies, all of which were then maintaining systems of mains and pipes in said city with the permission and consent of the municipal authorities. Upon the consolidation, the relator corporation became vested with all the rights, franchises, permissions and consents to construct and operate gas pipes in the streets of New York City, possessed by its constituent companies, and was in the year 1900 maintaining and operating a system of gas mains and pipes in the streets and avenues of the Borough of Manhattan in The City of New York under the rights and franchises so obtained (pp. 206 to 210). On October 31, 1899, the relator corporation filed with the State Board of Tax Commissioners a report showing its special franchises, its assets, earnings and indebtedness as required

by section 43 of the Tax Law, and subsequently filed two supplemental reports at the request of the State Board (pp. 149-164). Upon March 6, 1900, the State Board of Tax Commissioners, claiming to act under chapter 712 of the Laws of 1899, gave notice that it had fixed the valuation of the relator's special franchise as the basis of the assessment for taxation in the year 1900 at $15,828,600. The corporation by its counsel subsequently appeared before the Board and filed a written request for information as to the amounts which the Board had determined to be the values respectively of its intangible property in the streets and of its tangible property in the streets, which together constituted the special franchise, as to the method, rule or principle, if any, adopted by the Board in determining such valuation, and as to the value assigned by the Board to the special franchise derived by the relator from each of its six constituent companies. The Board declined to give any part of the information so requested (pp. 18, 210). Thereupon the relator filed with the Board a written statement under oath, complaining of the valuation as illegal and erroneous, and specifying various grounds of objection thereto (pp. 20, 210). Thereafter the State Board reduced the original valuation of the relator's special franchise to $13,950,000, and this final valuation was certified to the Department of Taxes and Assessments of The City of New York, and entered in the assessment-rolls of said City (p. 211).

This proceeding was thereupon, on July 14, 1900, commenced in the Supreme Court of the State of New York, Albany County, by the relator to review the assessment. The proceeding was commenced by the filing of a petition for a writ of certiorari. In the petition (pp. 3-10) seventeen separate grounds of illegality and error were asserted, among others being that the special franchise law of 1899 is in violation of the Constitution of the United States, in that it deprives the relator of its property without due process of law and denies to the relator the equal protection of the laws. Upon this petition a writ of certiorari issued, to which the State Board of Tax Commissioners filed its return (p. 13).

The case was then referred by order of the Supreme Court (p. 22), to a referee to take and report to the Court the evidence upon the issues raised by the petition and return, with his findings of fact and conclusions of law thereon. This case and several similar proceedings by other companies were tried together before the referee and one opinion was written by him (pp. 215 to 249) applicable to all the cases. The referee decided that the special franchise law was not in conflict with the United States or State constitutions, and sustained the assessment of relator's special franchise as made by the State Board, except that he found that relator's special franchise was unequally assessed as compared with all other real estate in The City of New York, which he found as a fact was assessed at only 67 per cent. of its full value, and he accordingly reduced the relator's special franchise assessment 33 per cent. and confirmed it as so reduced at $9,346,500. The referee reported to the Court his findings of fact and conclusions of law (pp. 206 to 215). To this report this relator filed exceptions (p. 249).

Upon the report of the referee without the production of further evidence and without opinion, the Supreme Court, at a Special Term thereof, rendered a *pro forma* decision (pp. 272 to 282) consisting of findings of fact and conclusions of law identical with those of the referee, and on July 15, 1902, made its final order (p. 284) confirming the assessment of relator's special franchise at $9,346,500 as fixed by the Referee. The relator duly filed exceptions to the decision of the Court, and to the Court's refusal to find other facts and make other conclusions of law as requested (p. 282).

The case was then taken on appeal to the Appellate Division of the Supreme Court in and for the Third Department, and there argued, together with the case of the People of the State of New York *ex rel.* Metropolitan Street Railway Company *vs.* State Board of Tax Commissioners, and several other cases. The Appellate Division, in an opinion entitled in the Metropolitan Street Railway case (pp. 288 to 311, 79 Appellate Division, 183), held that the special franchise tax

law was in violation of the so-called home-rule clause of the State Constitution, which provides that all city officers whose election is not provided for by the Constitution shall be elected by the electors of such city, or appointed by such authority of such city as the legislature shall direct, in that the assessment of a certain class of real estate in each city was by this law removed from the jurisdiction of the local assessors of real estate and conferred upon the state tax commissioners, who were neither elected by the electors of the city nor appointed by any city authority as required by this clause of the State Constitution. The Appellate Division, having arrived at the conclusion that the law was unconstitutional upon this ground, without discussing any other question involved, made its order (p. 287) reversing the order of the Special Term, and declaring the assessment illegal and void. No separate opinion was written in the case of this relator, but a memorandum decision (p. 287) was rendered herein reversing the order below upon the opinion in the Metropolitan Street Railway Company case.

From this order the State Board of Tax Commissioners appealed to the Court of Appeals, where the case was argued with six other cases involving the same questions. The Court of Appeals in one opinion (pp. 323 to 345, 174 New York, 417) rendered for all the cases, decided that the special franchise law did not violate the home-rule clause of the State Constitution and summarily overruled all other contentions of the relator. A motion for reargument in the Court of Appeals was made by this relator and denied (p. 312). The order of the Court of Appeals reversing the order of the Appellate Division and affirming that of the Special Term was thereupon remitted to the Supreme Court, Albany County (p. 1). The Supreme Court on June 22, 1903, by its order made the judgment of the Court of Appeals its judgment (p. 313). To review the decision of the Court of Appeals this writ of error to the Supreme Court of the State of New York was prosecuted.

SPECIFICATION OF ERRORS.

The errors assigned, upon which the plaintiff in error will rely, are as follows:

I.

Error in declining to hold that the act of the Legislature of the State of New York, approved May 26, 1899 (chapter 712, Laws 1899), entitled, "An Act to amend the tax law in relation to the taxation of public franchises as real property," in so far as it authorizes the assessment imposed by the State Board of Tax Commissioners on March 20, 1900, upon the franchises of the Consolidated Gas Company of New York, relator above named, deprives said relator of its property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

II.

Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, denies to said relator the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States.

The assignment of errors appears in the record on page 317.

ARGUMENT.

POINT ONE.

The record discloses that the Federal questions were duly asserted in the State courts, and that this Court has jurisdiction.

The decision presented for review by this Court is the decision of the Court of Appeals, the highest court of the State of New York, although the writ of error runs to the Supreme Court of the State of New York, to which court the record was remitted by the Court of Appeals with its decision, as required by the law of the State.

The decision of the Court of Appeals was a final judgment in the suit within the meaning of section 709, U. S. Revised Statutes. The Court of Appeals ordered and adjudged (page 1) " that the order of the Appellate Division of the Supreme Court appealed from herein be and the same is hereby reversed, and that of the Special Term affirmed with costs." By its terms, therefore, it is a final determination. The record and the judgment were remitted to the Supreme Court, not for any further proceedings in that court, but, in the language of the remittitur, " to be enforced according to law." And the formal judgment entered by the Supreme Court (page 314) in accordance with the direction of the remittitur, was in effect the judgment of the Court of Appeals (Polleys *vs.* Black River Co., 113 U. S., 81).

Both the federal questions upon which the plaintiff-in-error invokes the aid of this Court were asserted in the State courts. In its petition for a writ of certiorari the relator alleged that the assessment of its special franchise was illegal and erroneous upon the following grounds, among others (page 5):

> " II.—Because chapter 712 of the Laws of 1899, under which said State Board of Tax Commissioners assumed to,

and did, make such assessment and valuation, is unconstitutional and void in that it is in conflict with and violative of the provisions of the Constitution of the United States, that no State shall deny to any person within its jurisdiction the equal protection of the laws.

"III.—Because chapter 712 of the Laws of 1899 provides for the fixing of a separate and capitalized valuation upon your petitioner's special franchise as defined in said act, which property is not susceptible of a separate and capitalized valuation, and said act fails to provide any method, standard or rule of valuation, but leaves the same to imagination or caprice of the assessing officers, and thereby the property of your petitioner is taken without due process of law, contrary to section 6 of article I. of the Constitution of the State of New York, and contrary to section 1, article XIV. of the amendments to the Constitution of the United States.

"VII.—Because said State Board of Tax Commissioners, in making the assessment and valuation of your petitioner's special franchises, proceeded upon no legal or equitable basis, rule, theory or principle, but, on the contrary, said assessment and valuation is the result of mere guesswork on the part of said State Board of Tax Commissioners."

This assertion in the petition of the repugnancy of the special franchise Act to the United States Constitution is alone sufficient to give this Court jurisdiction to review the judgment of the Court of Appeals on writ of error, since that judgment was by its necessary effect adverse to these contentions.

Dewey *vs.* Des Moines, 173 U. S., 193, 199.
Roby *vs.* Colehour, 146 U. S., 153, 159.
Green Bay, etc., Co. *vs.* Patten Paper Co., 172 U. S., 58, 68.

But jurisdiction does not depend entirely upon the assertion of the federal questions in the petition. The jurisdic-

tional facts affirmatively appear in other portions of the record.

The Referee's report contains, as a conclusion of law (page 214), that "I. Chapter 712 of the Laws of 1899 is a valid and constitutional enactment." While there is not in this report any specific reference to the United States Constitution, his opinion, at page 248, which this Court may examine (Walter A. Wood Co. *vs.* Skinner, 139 U. S., 293, 295), expressly refers to the contentions that due process of law and the equal protection of the laws under the Federal Constitution were denied, showing thereby that these federal constitutional questions were urged upon him, and that his first conclusion of law, as above quoted, is intended to comprehend the questions arising under the Constitution of the United States as well as that of the State. To this conclusion of law the plaintiff-in-error duly excepted (page 250, exception 12).

The findings and conclusions of the Court at Special Term were practically identical with those of the Referee. The Court's decision contains a finding that the law is "a valid and constitutional enactment," but without specific reference to the Federal Constitution To this conclusion the plaintiff-in-error excepted (p. 283, exception 12).

When the report of the Referee came before the Special Term for confirmation, the plaintiff-in-error submitted proposed findings of fact and conclusions of law (pp. 251 to 272), requesting the Court to find the following conclusions, among others (p. 270):

> "25. The assessment is illegal in that the statute, namely, chapter 712 of the Laws of 1899, fails to prescribe any rule, method or principle of valuation for the special franchises sought to be taxed, and for this reason the statute violates the provisions of the Federal and State constitutions which prohibit the taking of property without due process of law (General Briefs, Nos. 3, p. 36, and 5, p. 46).

"26. The assessment is illegal in that it is impossible from the nature of the object taxed to supply any rule, method or principle of valuation for the guidance of the assessors in valuing the special franchises sought to be taxed, and for this reason the statute, namely, chapter 712 of the Laws of 1899, violates the provisions of the Federal and State constitutions which prohibit the taking of property without due process of law (General Briefs, Nos. 3, p. 36, and 5, p. 46).

"27. The assessment is illegal, because the statute, namely, chapter 712 of the Laws of 1899, is impossible of rational execution, in consequence of its failure to prescribe any rule, method or principle of valuation of the special franchises sought to be taxed, and must therefore be treated as a nullity, and an assessment under it is therefore in violation of both the Federal and State constitutions (General Brief, No. 3, p. 36)."

The Court refused to make the findings of fact and conclusions of law submitted by the relator (p. 281). To this refusal the relator duly excepted (p. 283, exception 17).

This was the last opportunity afforded the plaintiff-in-error to spread the federal questions upon the record. During the subsequent progress of the proceeding in the State courts, the practice in those courts did not require or permit the filing of any paper in the nature of exceptions or assignments of error in which these questions could be raised.

The Appellate Division reversed the order below upon a single point under the State Constitution and without reference to any other questions argued before it. From the Appellate Division to the Court of Appeals the Tax Commissioners were appellants. The Court of Appeals devoted its opinion almost wholly to the State constitutional point, holding that the remaining questions raised by the relators did not require elaborate consideration. Its opinion does, however, expressly refer to and overrule

without discussion (p. 345) the contention that due process of law was not observed in the taxation of this property. That the Court may examine the opinion of the Court of Appeals to ascertain what was considered and decided by it, is now well established (Philadelphia Fire Association *vs.* New York, 119 U. S., 110, 116; Sayward *vs.* Denny, 158 U. S., 180, 183; Land and Water Co. *vs.* San Jose Ranch, 189 U. S., 177, 180). No reference is, however, made in this opinion to the contention that the relator was denied the equal protection of the laws; but the omission of the Court of Appeals to discuss this question in its opinion does not affect the jurisdiction when the question is properly raised in the pleadings (Roby *vs.* Colehour, 146 U. S., 153, 159; C. B. & Q. R. R. *vs.* Chicago, 166 U. S., 226, 231).

Since reference cannot be made to the briefs in the various courts of the State to show that the federal questions were persistently urged in every court and upon every possible opportunity, it was impossible for the plaintiff-in-error to show the assertion of these federal questions otherwise than as disclosed by the present record.

POINT TWO.

A legislative enactment which requires or authorizes the taxation of a certain class of property upon the basis of a sum arbitrarily fixed by the assessing officers, without reference to the value of the property, constitutes a deprivation of property without due process of law and a denial of the equal protection of the laws.

We shall show hereafter that the Consolidated Gas Company's special franchise was not assessed or valued by the State Board in any sense of these words, but that a sum was arbitrarily fixed by the Board, without reference to the value of the property, as the basis upon which the special franchise should be taxed.

The propositions which we desire to present and establish primarily are that such absolutely arbitrary conduct on the part of the assessing officers is a violation of the Federal Constitution, in that it deprives the taxpayers of their property without due process of law and denies them the equal protection of the laws; and that a law which is held by the State courts to authorize such arbitrary conduct in its administration is necessarily unconstitutional.

We are here concerned only with the imposition of a general property tax; not a specific tax or license tax, or a tax upon a corporation as a condition on which it may exist and transact business.

Is it within the power of a State, under the Federal Constitution, to permit or countenance the levying of property taxes not apportioned upon assessments or valuations of the property to be taxed, but exacted from the owners of property upon the basis of sums arbitrarily designated by some official as representing the amount on which the property-owner shall pay taxes? Or, to state the question more concisely, may the State commit to its official or agent the power to determine arbitrarily the tax which each property-owner shall pay upon his property? If A and B own property identical in character, amount and value, can the State lawfully vest in its agent or official the power to determine and require that A shall pay a tax of $1,000 upon his property, and that B shall pay a tax of $10,000 upon his similar property? These three statements of the question involve the same proposition and are but different statements of the same issue. For the result is the same, whether unequal, unjust and arbitrary tax rates are levied upon equal and proper valuations of the property to be taxed, or a uniform rate of tax is applied to different properties at unequal, unjust and arbitrary valuations. Either is arbitrary and unequal taxation.

People *vs.* Weaver, 100 U. S., 539, 544, 546.

That such taxation, if taxation it may be called, is contrary to the fundamental spirit and principle of our govern-

mental institutions, as expressed in the Fourteenth Amendment, seems too obvious to require argument.

The principle involved has been well expressed by the eminent jurist and authority upon constitutional law, Judge Cooley:

> "It is of the very essence of taxation that it be levied with equality and uniformity, and to this end that there should be some system of apportionment."
>
> Cooley on Constitutional Limitations, 7th ed., p. 705.

> "But the requirement of apportionment is absolutely indispensable in any exercise of the power to tax. There can be no such thing as valid taxation when the burden is laid without rule, either in respect to the subjects of it or to the extent to which each must contribute. In this respect the Legislature is as powerless as any subordinate authority, it being impossible there should be taxation that is at once arbitrary and valid. Whenever, therefore, the tax is to be levied upon property, agencies for the apportionment of it by the prescribed rule are as indispensable as the rule itself. And the duty they have to perform is to make the sum demanded of any one person or laid upon any one parcel of property have some fixed ratio, not only to the whole tax, but also to that demanded of every other person or laid upon every other piece of property. Without this, as has been forcibly said, the exactions of money for the public are mere forced contributions."
>
> Cooley on Taxation, 3d ed., vol. I., p. 419.

It will not, of course, be seriously contended that State taxation matters are an exception from the prohibition of the Fourteenth Amendment; that the States are not required to observe due process of law and afford the equal protection of the laws in matters of taxation as they must in the exercise

of all other governmental functions. As said by the late Mr. Justice Field, of this Court, in the case of the County of Santa Clara *vs.* Southern Pacific Ry. Co., 18 Fed., 385, at page 399:

> "It would, indeed, as counsel in the *San Mateo Case* ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read, as contended it does in law: 'Nor shall any state deprive any person of his property without due process of law, *except it be in the form of taxation;* nor deny to any person within its jurisdiction the equal protection of the laws, *except it be by taxation.*' No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used."

And if, as must be conceded, due process of law and the equal protection of the laws on the part of the State in the exercise of its taxing power are guaranteed by the Fourteenth Amendment, it is difficult to conceive any taxation procedure under the authority of the State which would more surely violate and contravene the constitutional guarantees than the commission to an official of power and authority to determine and fix arbitrarily the amount of the tax due from each property-owner.

While the determination of the method of apportioning a tax is undoubtedly within the legislative power of the State, uncontrolled by the Federal Constitution (Davidson *vs.* New Orleans, 96 U. S., 97, 104; Walston *vs.* Nevin, 128 U. S., 578, 582), the Federal Constitution requires that some method of apportionment of the burdens of a tax shall be provided; that the tax shall not be arbitrarily laid.

This Court has not, so far as we can discover, been called upon to decide any question of general State taxation even remotely resembling the question here presented. We are not, therefore, able to present any decision by this Court upon this precise proposition.

In Turpin *vs.* Lemon, 187 U. S., 51, 57, this Court said:

"Exactly what due process of law requires in the assessment and collection of general taxes, has never yet been decided by this Court."

There are, however, in several opinions of this Court expressions which are in accord with the proposition which we make, and which must be regarded as applicable to the present proposition if they are to be given any effect whatever.

In *In re* Kemmler, 136 U. S., 436, 448, the Court said that the Fourteenth Amendment refers to

> "that law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. *Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property*, and secures equal protection to all under like circumstances in the enjoyment of their rights."

In Hodgson *vs.* Vermont, 168 U. S., 262, 273, this Court again said:

"The Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property."

In Yick Wo *vs.* Hopkins, 118 U. S., 356, 369, this Court said:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they did not mean to leave room for the play and action of purely personal and arbitrary power."

In Pollock *vs.* Farmers' Loan and Trust Co., 157 U. S., at page 599, Mr. Justice Field, in his separate opinion, concurring with the majority opinion, said:

> "The inherent and fundamental nature and character of a tax is that of contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax. This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property."

In McMillen *vs.* Anderson, 95 U. S., 37, 41, this Court said:

> "The mode of assessing taxes in the States by the Federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done."

Similar expressions are to be found in the decisions of the highest courts of several States.

In Stuart *vs.* Palmer, 74 N. Y., 183, a New York law directing commissioners to grade and improve certain land and assess the expense thereof upon the lands which, in their judgment, would be benefited by the improvement, in proportion to the benefits, was held unconstitutional because of the absence of any provision for notice to the taxpayer. Judge Earl, speaking of the unlimited power of the State to impose taxes, said, at page 189:

> "But in all cases there must be apportionment of the burdens, either among all the property-owners of the State, or of the local division of the State, or the property-owners specially benefited by the improvements. In either case, if one is required to pay more than his share he receives no corresponding benefit for the excess, and that may properly be styled extortion or confiscation.

> A tax or assessment upon property, arbitrarily imposed, without reference to some system of just apportionment could not be upheld. * * *
>
> Taxation and assessment imply apportionment. Each person must share the burden of taxation and assessment equally with all others in like situation."

In People *ex rel.* Edison Illuminating Company *vs.* Barker, 139 N. Y., 55, the Court of Appeals said, at page 60:

> "This decision (of assessors), it need scarcely be said, is not to be capricious, arbitrary or fanciful. It must be based upon some evidence or facts, and should be the result of the exercise of judgment and discrimination."

In People *vs.* Equitable Trust Co., 96 N. Y., 387, involving a tax on the business of foreign corporations, Judge Earl said, at page 395:

> "While the taxing power is thus supreme, yet it may be so exercised as to transcend constitutional restraints and to invade rights protected by constitutional guarantees. If, under the guise of taxation, the legislature should attempt to make exactions purely arbitrary, without any apportionment or appraisal, founded upon no rule of equity or justice, its act might be condemned as depriving the owner of his property without due process of law."

In Nehasane Park Ass'n *vs.* Lloyd, 167 N. Y., 431, 439, the New York Court of Appeals, having under consideration an assessment by statute of 15 cents on each 100-acre tract in one county and 10 cents on each 100-acre tract in another county, said:

> "We are not prepared to say that the statute was a valid exercise of power under the Constitution. It has been generally understood that a fixed and arbitrary sum assessed by statute upon property and imposed without reference to some system of just and equitable appor-

ment, and without any opportunity to the owner to be heard, cannot be upheld."

In People *vs.* Mayor of Brooklyn, 4 N. Y., 419, it was said at page 427:

"Taxes cannot be laid without apportionment."

In Ryerson *vs.* Utley, 16 Mich., 269, 276, Judge Cooley said:

"The control of the State in regard to taxation is certainly very great, but it is by no means unlimited, and it cannot be exercised in an arbitrary manner, nor without regard to those principles of justice and equality on which it is based."

Expressions to the same effect are found in the following:

Taylor *vs.* Chandler, 9 Heiskel (Tenn.), 349, 356, 357.
C. B. & Q. R. R. Co. *vs.* Cole, 75 Illinois, 591.
Merrill *vs.* Humphrey, 24 Michigan, 170, 173.
People *ex rel.* Detroit & Howell R. R. Co. *vs.* Township, 20 Michigan, 452, 424.

The foregoing are fair examples among a multitude of similar general expressions which might be quoted, and we will not burden this brief with others.

The decisions of the late Mr. Justice Field, rendered at Circuit, in the California railroad tax cases, are authority upon the proposition which we now present, and are entitled, we believe, to great weight in the consideration of this Court.

In San Mateo County *vs.* Southern Pacific Ry. Co., 13 Fed., 722, Mr. Justice Field, Circuit Judge Sawyer concurring, held that the assessment of railroad property in California, at its full value, without deduction of mortgage indebtedness, while the property of individuals was assessed only upon the equity remaining after the deduction of all mortgage indebt-

edness, was a violation of the Fourteenth Amendment. Mr. Justice Field said, at page 733 :

> " The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive anyone within its jurisdiction of the equal protection of the laws. And by equal protection of the laws is meant equal security under them to everyone on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.
>
> " Unequal exactions in every form, or under any pretence, are absolutely forbidden ; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible ; where different persons may be taxed on their property of the same kind, similarly situated, at different rates ; where, for instance, one may be taxed 1 per cent. on the value of his property, another at 2 or 5 per cent., or where one may be thus taxed according to his color, because he is white, or black, or brown, or yellow, or according to any other rule than that of a fixed rate proportionate to the value of his property."

And again, at page 735 :

> " As the foundation of all just and equal taxation is the assessment of the property taxed,—that is, the ascer-

tainment of its value,—in order that the tax may be levied according to some ratio to the value, uniformity of taxation necessarily requires uniformity in the mode of assessment as well as in the rate of taxation."

This case was taken to this Court on writ of error and argued at the October Term, 1882, but its decision postponed by stipulation until other similar cases then pending under the same California law, should come before the Court (116 U. S., 138).

The case of Santa Clara County *vs.* Southern Pacific Ry. Co., 18 Fed., 385, and other railroad tax cases argued at the same time, arose under the same California law involved in the *San Mateo case, supra.* In these cases, in another exhaustive opinion, Mr. Justice Field, Circuit Judge Sawyer concurring, held that the Federal Constitution was violated by the discriminating assessments of railroad property. In the course of this opinion, Mr. Justice Field said, page 394:

"The basis of all *ad valorem* taxation is necessarily the assessment of the property; that is, the estimate of its value. Whatever affects the value necessarily increases or diminishes the tax proportionately. If, therefore, any element which is taken into consideration in the valuation of the property of one party, be omitted in the valuation of the property of another, a discrimination is made against the one, and in favor of the other, which destroys the uniformity so essential to all just and equal taxation."

Page 395:

"The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value,—at a half or a quarter of it,—and the property of

another at more than its value,—at double or treble of it, —according to the will or caprice of the state."

Page 399 :

"Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality ; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition. The amendment is aimed against the perpetration of injustice, and the exercise of arbitrary power to that end. The position that unequal taxation is not within the scope of its prohibitory clause would give to it a singular meaning. It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world."

The decision of the federal constitutional questions in the *San Mateo* and *Santa Clara cases* was imperative. It appears by the records of those cases and by the statement of Judge Sawyer at the close of his opinion in the *Santa Clara case*, page 444, that the jurisdiction of the United States Circuit Court was invoked solely upon the ground that the Federal Constitution was necessarily involved. The *Santa Clara case* and the cases argued at the same time, were affirmed by this Court (118 U. S., 394), but without any decision of the federal constitutional point, the affirmance being upon the ground that the assessments were in violation of the State Constitution in that

the State Board had included in its assessments of railroad property, property not placed by the State Constitution within the jurisdiction of that Board.

In Russell *vs.* Croy, 164 Missouri, 69, 97, there was involved an amendment to the State Constitution copied from the provision of the California Constitution, providing that the real property of individuals should be taxable only on the equity remaining after the deduction of mortgage indebtedness, while the real property of railroads should be taxed on its full value without deduction. The Supreme Court of Missouri followed the decisions of Mr. Justice Field in the California cases above quoted, and held that this provision of the State Constitution contravened the Fourteenth Amendment of the Federal Constitution.

The reasoning and arguments of Mr. Justice Field, in the cases above quoted, are convincing, and both his reasoning and the precise points decided are controlling here. The decision in those cases was that State taxation provisions which operated without equality and without uniformity upon all persons possessing similar property were unconstitutional. The same principle applies with greater force where the law, instead of merely directing specified deductions in certain cases which cause unequal results, commits an arbitrary power to the assessing officers, and that power is exercised in an arbitrary, unjust and unequal manner.

A decision even as directly in point as these decisions of Mr. Justice Field, to which we ask the Court's attention, is Chicago Union Traction Co. *vs.* State Board of Equalization, 114 Fed., 557 (decided April, 1902). This case involved suits by the public utility corporations of Chicago to enjoin collection of taxes upon a reassessment of the companies' capital stock for 1900. The State Board of Equalization had, in 1900, assessed the capital stock, including franchises of these companies and the taxes levied thereon had been paid. Subsequently, in a mandamus proceeding on the rela-

tion of certain citizens in the State Court, this State Board was ordered to make a reassessment, taking into consideration, among other things, the market value of the shares of stock of the companies. Such reassessments were made at greatly increased amounts over the original assessments. Diverse citizenship was not present in any of the cases, jurisdiction being predicated on the proposition that the reassessments, if enforced, would deprive complainants of their property without due process of law and deny them the equal protection of the laws. The Circuit Court (Circuit Judge Grosscup and District Judge Humphrey), found that the reassessments were not the exercise of the Board's judgment, but that the market quotations of the share stock on a certain day and the total indebtedness had been taken by the Board as a fixed standard, and that the resulting estimates were excessive and unequal as compared with the assessment of other property. Judge Grosscup in his opinion, said, page 565:

> "The sum of it all is, that by whatsoever causes brought about, the reassessments complained of did not, in our opinion, express the real judgment of the State Board as an independent tribunal, and were, therefore, in effect, fictitious judgments, for the impeachment of which, somewhere, the law holds out opportunity to the parties injured. Is the remedy prayed for in the bills within the complainants' legal opportunities?
>
> "Taxes are enforced contributions, levied by the State upon the property of individuals, by virtue of its sovereignty, for the support of government, and for the public needs. The money thus taken, until taken, is, as much as real estate or chattels, property within the meaning of the Constitution of the United States; and the taking of such money is a taking of property, as much so, for instance, as the taking of private land for some public work authorized by some law of the State or of Congress.
>
> "Due process of the law as applied to the cases under consideration, is the authorized procedure whereby the

property of the individual can be taken by the State; it includes the initial authority to levy taxes; the purpose to which money thus raised is to be devoted; and the instrumentalities that distribute the burden upon the citizens. Ours is a government of laws, and not of individual officers, or of boards, or of men.

"Any substantial departure, therefore, in the collection of taxes, from the law, either as to the authority for a tax, or its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law; and the enforced collection of taxes, in the laying and distributing of which there is a substantial departure from law, is the depriving of a citizen of his property without due process of law. * * *

"The sum of all this, as applied to the cases under consideration, is that the reassessments complained of do not embody the real judgment of the board, in either the assessment or the equalization of the capital stock of complainants for the year 1900; and that in the absence of such real judgment, the threatened collection of taxes on the basis of the fictitious entry, would be to deprive complainants of their property without due process of law."

The constitutions of several States contain provisions requiring all taxation of property to be uniform and to be apportioned according to value. No such provision, however, exists in the Constitution of the State of New York. Such constitutional provisions are merely declaratory of the fundamental principle of due process of law in taxation. The same necessity of an apportionment according to value exists independently of any such State constitutional provision. An apportionment by value is the only escape from the oppression and injustice of arbitrary exactions.

"What is called for under a constitutional provision requiring equality and uniformity in the taxation of property, must be equally called for by the fourteenth

amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio, would be inconsistent with that equal protection which the amendment requires the State to extend to every person within its jurisdiction."

San Mateo case, 13 Fed. 722, at 734.

In Railroad and Telephone Companies *vs.* Board of Equalizers, 85 Fed., 302, 317, the United States Circuit Court in Tennessee held that a violation of the requirement by the State Constitution, of equality and uniformity in taxation, is equally a deprivation of a right secured by the Fourteenth Amendment to the Federal Constitution. The same point was decided in Nashville, C. & St. L. Ry. Co. *vs.* Taylor, 86 Fed., 168. The latter case was affirmed by the Circuit Court of Appeals, 88 Fed., 350, and certiorari was denied by this Court, 172 U. S., 647.

In Albany City National Bank *vs.* Maher, 9 Fed., 884, Circuit Judge Wallace declared void an act of the New York Legislature imposing upon shareholders of State and National banks the amount of assessments against them under a former law which had been held void. Judge Wallace said:

> "It is in effect a legislative assessment of a tax imposed upon a body of individuals selected out of a general class, without apportionment or equality as between them and the general class, or as between themselves. * * * It is of the very essence of taxation that it be levied with equality and uniformity, and that there should be some system of apportionment."

In Woodbridge *vs.* Detroit, 8 Mich., 274, wherein was involved an ordinance permitting the assessment of the expense of paving a street in front of any particular lot wholly upon that lot, Judge Campbell said, page 294:

> "The principle of uniformity which our Constitution requires is really no new requirement, but in some way enters into every proper tax.

"The very term taxation, whether used in a constitution or elsewhere, signifies a proportioned charge upon some uniform standard either of value or something else, which will afford a means of comparison."

In the same case, Judge Christiancy said, at page 301:

"With the single exception of specific taxes, the terms 'tax' and 'assessment,' both, I think, when applied to property, and especially to lands, always include the idea of some ratio or rule of apportionment; so that, of the whole sum to be raised, the part paid by one piece of property shall bear some known relation to, or be affected by, that paid by another. * * * To compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property, or by one person, to bear any relation whatever to that paid by another, is, it seems to me, to levy a forced contribution, not a tax, duty or impost, within the sense of these terms as applied to the exercise of powers by any enlightened or responsible government."

In Assessment Board *vs.* The Alabama Central R. R. Co., 59 Ala. 551, the Court had before it the validity of an act of the General Assembly, which provided that in no case should the property of a railroad company be estimated for purposes of assessment at a sum less than that, which, at an interest of 8 per cent. would yield the sum constituting the net earnings of such property. This was held to be in violation of the provision of the Alabama Constitution which provided that "All taxes levied on property in this State shall be assessed in the exact proportion to the value of such property." The Court, per Brickell, *J.*, said, at page 555:

"The Constitution is plain and imperative. The value of the property, not its income, is the standard on which an assessment must be based. The Legislature may prescribe rules and may supply instrumentalities for

ascertaining such value. It may, as it has done in other parts of the statute under consideration, clothe the assessors, or the Board of Assessment, with powers to obtain proper evidence on which they can proceed to ascertain such value. Though these officers, in observing these rules, and in passing on such evidence, should err to the prejudice of the State, or of the taxpayer, there would be no remedy for the correction of such error. The statute under consideration passes beyond providing a mere rule for ascertaining the value of the property of railroad companies. The value of such property can in no event be assessed at less than a sum, which, at 8 per cent. per annum, would produce its annual net earnings. If its net earnings, ascertained in the mode prescribed, will not produce a sum at 8 per cent. per annum, equal to the value of the road as otherwise shown, then the assessment of taxes must be on such value. In the one case the income of the property furnishes a conclusive standard of value; in the other it is wholly discarded. *The Legislature has not power to declare the value of property and then assess taxes upon it as of that value;* nor has it the power to assume and declare that the net income or earnings of property is an unerring test of its value. The value of the property, considering the uses for which it is employed, and the profit which may be derived from it, may be ascertained under rules which the Legislature may prescribe. The value must be ascertained and taxes assessed upon it. It is not competent for the Legislature to declare that any species of property is of a particular value, because of its income, or to declare that the income alone shall be considered in determining its value. If the rule prescribed for the assessment of taxes on the property of railroads was applied to the assessment of the property of individuals, the violation of the Constitution would not be doubted. * * * We are bound to declare the Constitution does not authorize the Legislature to prescribe or declare an arbitrary or artificial value of the prop-

erty of individuals or corporations and assess taxes on such valuation. This is attempted by the statute prescribing the rule by which the Board of Assessment was governed. The assessment is, consequently, invalid—an excess of authority by the board."

In Marsh *vs.* Board of Supervisors of Clark County, 42 Wis., 502, it was claimed that the assessors had made no valuation of the property in certain towns upon actual view, as required by statute, but had fixed practically uniform values per acre on all land, regardless of its different value. The Court held the assessments invalid, and the conduct of the assessors in fraud of the statute. Said Ryan, *C. J.*, at page 509:

"Doubtless taxes are a debt due to the State by its citizens for protection in life, liberty and property (Warden *vs.* Supervisors, 14 Wis., 618). But the debt is liquidated and matures only upon a valid exercise of the taxing power. Here, the exercise of the taxing power must be upon a uniform rule; and it is only upon an equal assessment, as the foundation of uniform apportionment, that the taxing power can be put in operation. * * * But, under our constitution, the assessment is not only an essential part of the process, but seems to be jurisdictional. For in no other way does it appear possible to collect taxes upon property by uniform rule. Indeed, the Constitution so clearly implies uniform assessment of values as an essential prerequisite to taxes upon property, that it is not unsafe to hold that the Constitution itself makes such assessment jurisdictional. It is certainly so by statute. And such a tax, to be valid under the Constitution, must proceed upon a regular, fair and equal assessment of the property to be taxed, made by the officers, in the manner and with the securities and solemnities provided by statute. These last the Legislature may make and alter at pleasure; but no statute can dispense with assessment, or with its essential fairness and equality."

In State *vs.* Township Committee of Readington, 36 N. J., Law, 66, 70, the New Jersey Supreme Court considered unconstitutional an act directing that a second assessment for cost of a school building should be levied upon the taxpayers who were delinquent in their payment of the previous assessment. The Court said:

> "But it is not every exaction made under color of taxation that can be supported as the legitimate exercise of the sovereign power of taxation. It is of the very essence of taxation that it should be equal and uniform. * * * * A tax upon the persons or property of A, B and C, individually, whether designated by name or in any other way, which is in excess of an equal apportionment among the persons or property of the class of persons or kind of property subject to the taxation, is to the extent of such excess. the taking of private property for a public use, without compensation. The process is one of confiscation and not of taxation."

From the foregoing presentation of authorities it cannot be doubted that arbitrary and unequal exactions under the name of taxation not based upon a common ratio or rule are inconsistent with the fundamental institutions of our Government, and do not constitute due process of law or afford the equal protection of the laws within the Fourteenth Amendment. Unequal and arbitrary tax burdens can no more be imposed upon citizens of a State under the Federal Constitution than arbitrary punishment for crime, or arbitrary and unequal burdens of any kind.

POINT THREE.

The State Board of Tax Commissioners made no assessment or valuation of the relator's special franchise, but fixed an arbitrary sum as the basis upon which these special franchises should be taxed, and the Court of Appeals has held that the acts and determinations of the State Board are valid and authorized by the special franchise tax law.

The act of 1899 directs that the "State Board of Tax Commissioners shall annually fix and determine the valuation of each special franchise subject to assessment in each city, town or tax district," and certify the valuation to the local authorities of each city or town in which the special franchise is situated, as a basis for taxation.

The Subject of the Assessment.

The act defines a special franchise as "a franchise, right, authority or permission specified in this sub-division (viz., subdivision 3 of section 2 of the Tax Law as amended by this act)", and declares that such special franchise "shall be deemed to include the value of the tangible property of a person, co-partnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters, in connection with the special franchise."

The special franchise possessed by the relator was the right, franchise or permission to lay, maintain and operate gas pipes and mains in all the streets, avenues and public places of the old City of New York, or the Borough of Manhattan of the present Greater New York (p. 209, Findings 27 to 29). While the relator had the right to occupy all streets and avenues of the city, it did not in fact maintain pipes in all the streets (p. 210, Finding 30), but had constructed and maintained 857 miles of pipe with 103,867

services, that is, connections between its street pipes and the house pipes of its patrons (p. 211, Finding 41).

The subject of the Board's assessment in the case of this relator was, therefor: (1), the value of its franchise, right, authority or permission to construct, maintain and operate in, under or through the streets, highways and public places of The City of New York mains and pipes for conducting gas; and (2), its mains and pipes laid or placed in or under the streets and public places.

No Method of Assessment was Prescribed.

Notwithstanding the peculiar nature of these special franchises, the Act of 1899 prescribed no method by which their value should be determined.

A special franchise as a whole, both its tangible and intangible elements, was declared by the Act to be real estate.

The Revised Statutes of New York, Part I., chapter 13, section 17 (2 R. S. Banks, 9th Edition, page 1685), provided in 1900:

> "All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor.

The Greater New York Charter, section 889, as in force in 1900, prescribed that all real property in New York City should be assessed at

> "the sum for which said property, under ordinary circumstances, would sell."

Comparison with assessments of other gas franchises is conclusive proof of the arbitrary character of the assessment.

Conclusive proof of the arbitrary character of these so-called assessments of the special franchises by the Board is

furnished by a comparison of the valuation of the special franchises of the different gas companies operating in New York City. At the time of these assessments there were four gas companies operating in Manhattan Borough of New York City, possessing exactly identical franchises to use the streets. These were, besides the Consolidated Gas Company (this relator), the New York Mutual Gas Light Company, the Standard Gas Light Company and the New Amsterdam Gas Company (Referee's finding 47, pp. 212, 213). The Referee's finding does not expressly designate the extent of the franchise of any of these four companies, but the statutes under which each company derived its franchise are incorporated in the finding by reference thereto.

The franchise of the Standard Gas Light Company appears as an Exhibit on page 197, being a special law by which the company was empowered to lay conductors and mains for conducting gas through and under all the streets, avenues, squares and public places of The City of New York.

The New Amsterdam Gas Company was a consolidation of the Equitable Gas Company and the New York and East River Gas Company. The New York and East River Gas Company possessed the franchise of the East River Gas Company of Long Island City (p. 48), which appears at page 199, being a special law, by which that company was empowered to lay and maintain conductors, mains and pipes through and under any streets, avenues and public places of The City of New York. This record does not show the franchise of the Equitable Gas Light Company, but the record of the New Amsterdam Company, No. 78 on this docket, shows (p. 10) that the right of the Equitable Company also extended to all the streets of the City.

The record does not show the extent of the franchise of the New York Mutual Gas Light Company with sufficient definiteness to make it available for purposes of comparison.

It thus appears that the Standard Gas Light Company, and the New Amsterdam Gas Company, as the successor of the

East River Gas Company of Long Island City, and the Equitable Gas Light Company, like the Consolidated Gas Company, possessed the right to lay mains and pipes in all the streets of the City of New York. These companies thus possessed special franchises of the same nature and extent. Their rights were identical. Yet the State Board assessed their special franchises as follows (finding 49, p. 213):

Consolidated Gas Company.....	$13,950,000
Standard Gas Light Company.....	3,127,790
Mutual Gas Light Company.....	2,326,174
New Amsterdam Gas Company.....	4,426,615

The subject of the assessment was the value of the right to occupy the streets. As the rights of these several companies were absolutely the same, their assessable value could not differ, and yet the assessments for the same right vary nearly $11,000,000. The only element that could cause any variance in the values is the value of the tangible property which was included in each assessment. The Referee found the Consolidated Gas Company's tangible property to be worth $4,908,088, leaving as the value assigned to the intangible right $9,041,912, or nearly three times the assessment of the Standard Gas Company upon its tangible and intangible property both. Such a comparison shows therefore conclusively that the assessments are not based upon the value of the special franchises, but are arbitrarily fixed and limited only by the financial resources of the corporation which is liable for the tax.

A.

THE METHOD WHICH WAS ADMITTEDLY ADOPTED BY THE STATE BOARD WAS ILLEGAL AND COULD NOT RESULT IN ANY ASSESSMENT OR VALUATION.

The State Board did not arrive at or state a separate valuation for the intangible right to use the streets and the tangible property in the streets, that is, the mains, pipes and services, but fixed the sum of $13,950,000 as representing the value of both the tangible and intangible property composing

the special franchise (p. 211, finding 40). The Referee found from the uncontradicted evidence introduced by the relator that the value of the tangible property in the streets was $4,908,988 (p. 211, finding 41). The sum assigned as the value of the intangible right to use the streets is, therefore, $9,041,912.

An attempt made by the relator before the commencement of legal proceedings to ascertain the method, rule or principle, if any, adopted by the State Board in making this assessment, was fruitless. The Board refused to give any information requested on the subject (p. 210, finding 34).

Upon the hearing before the Referee, counsel for the relator companies examined the Chairman of the State Board, and the testimony given by him upon that examination is luminous. We shall not refer to any testimony upon any disputed question of fact; there is practically no contradictory or conflicting evidence in the record upon any point, but we shall refer to the testimony of Chairman Priest as constituting admissions by the State Board. It was stipulated (p. 72) that the testimony of the two other members of the Board, they being present at the hearings, should be deemed to have been taken and to be of the same tenor and effect as the testimony of Chairman Priest. The findings of fact by the Referee did not purport to include all the facts established by this testimony, and, as the testimony constitutes a series of admissions by the adverse party herein, which are not contradicted or disputed, we are surely strictly within our rights in referring thereto. Otherwise the failure of the trial Court to find certain facts, educed and undisputed at the trial, could be made a simple and effective means of defeating the jurisdiction of this Court to all State cases.

The State Board admitted that in making these assessments they were able to devise no rule or principle to guide their determination. Mr. Priest testified (p. 58):

> "*Q.* Having before you the documents and papers and information to which you have referred, will you please

state the method which was applied by the Board in arriving at the several assessments? *A.* If you mean by 'method' the rule, a fixed rule, there was none applied; each property was treated individually and upon its own conditions."

And again (p. 61):

"*Q.* And no rule or principle or general principles was adopted in the making of these various valuations? *A.* There was no fixed rule."

And again (p. 65):

"*Q.* Is it not a fact that the Board in arriving at these various assessments, from the want of any general rule which would apply in all cases, did in each special case assess the special franchise against the company owning the same at what the Board thought was fair? *A.* Yes.

Q. Isn't it the fact that the Board was unable to devise or find any general rule or principle to adopt in making these various assessments? *A.* That is true.

Q. Isn't it the fact that the Board was, in the nature of things, constrained in most cases to conjecture what it thought would be the fair value of these special franchises, of taking into consideration those matters which you have heretofore mentioned? *A.* I think all assessment is far from an exact science; I am not willing to answer these were guesses, conjectures.

Q. Was there a special method which you found you could apply and with which you could figure out the assessment in any particular case? *A.* If you mean by that a rule such as taking any certain percentage of gross or net receipts, no; it would make large and valuable franchises pay ridiculously small taxes; it would crush out the smaller franchises throughout the State.

Q. For that reason you did not apply that rule? *A.* We did not apply that rule.

Q. Did not apply any general principle? *A.* Any general rule."

And again (p. 69):

"*Q.* I have understood from you that in case of the tangible property connected with special franchises you endeavered to apply the rule that the cost of reproduction was the measure of value. Am I correct in that?

The REFEREE—He answered the question in this way: The cost of reproduction, taking into account depreciation.

The WITNESS—That was my answer.

Q. This was a general rule applied in all cases; was it not? *A.* Yes, sir.

Q. Is it not the fact that you were unable to apply any analagous general rule to the case of the special franchises which the Board assessed the value of? *A.* There was no analogous rule for the treatment of intangible property, certainly."

It was also established by the admissions contained in the testimony given by the State Board that the principal factors upon which their determination was based were (1) the aggregate market value of the share stock and bonds; (2) the aggregate assets of the corporation, and (3) the earnings of the corporation. We beg to refer the Court to the following testimony upon this subject (p. 56):

"*Q.* Did the Board in valuing the various franchises of the various companies, take into consideration, among other matters, the market value of their securities; that is to say, their stocks and bonds? *A.* Yes, sir; the market value of those securities, the capital stock and the bonds were considered as they were reported in the 'Financial Chronicle' of January 7, 1900.

Q. Were these various figures aggregated together so that you had before you at that time a sum total repre-

senting the market value of all the securities, stocks and bonds of the system? *A.* Yes, sir; they were so aggregated. * * * * * * *

Q. What other elements were considered by the Board at this time in connection with the market value? *A.* The earning power of this property as reported to us by the company."

Page 59:

"*Q.* Did you arrive, or in making these various assessments deduct from the amount before the Board the funded or bonded indebtedness of the various companies? *A.* No, sir; we did not.

Q. Was no deduction made in the case of any company which was assessed by you, or was no deduction made from the proposed assessment of any company which was assessed by you for its amount of funded or bonded debt? *A.* No, sir; we considered that as an element of value, if considered at all."

Page 61:

"*Q.* Where there any other factors of equal importance in arriving at the value of these various special franchises on the part of the Board? *A.* Not that I now recall."

Page 63:

"*Q.* Did the Board take into consideration in arriving at the value of these special franchises the entire value of the corporate assets of the company? *A.* Yes, sir; they were considered.

Q. Were they considered as an appreciating factor where they were large in amount? *A.* Yes; sir."

Page 74:

"*Q.* I understand from your previous testimony that in assessing the special franchises of the different companies, you valued the special franchises according to the

earnings of the company? *A.* That was one of the elements taken into consideration; yes, sir; and one of the principal elements.

Q. If the earnings of the company were larger then the valuation was made larger, and if they were smaller the valuation was made smaller? *A.* I think I may answer yes to that proposition."

The market value of the share stock and bonds furnishes no evidence of the value of the special franchise.

Neither the market value of the share stock nor that of the bonds is any indication of the actual value of the total property of the corporation, much less can either be evidence of the value of a single particular item of the corporate property such as a special franchise. The Court of Appeals of the State of New York has held that the market value of share stock is not relevant as showing the value of the corporate property.

> People *ex rel.* Trust Co. *vs.* Coleman, 126 New York, 433.
>
> People *vs.* Commissioners of Taxes, 23 New York, 192, 218.

The Court of Appeals has also held that the taxable assets of a corporation cannot be determined by the amount of outstanding mortgage bonds.

> People *ex rel.* Manhattan Railway Co. *vs.* Barker, 146 New York, 304, 313.

It is undisputed in the record that the stock ($39,000,000 par) of this relator had varied in its market quotations during the previous year from $164 to $222.50 per share, and the bonds from 104 per cent. to 106 per cent. This alone shows conclusively that the market price of stock and bonds is no index of the actual value of the property. The corporate property could not have changed $22,000,000 in actual value

during the year, yet this is the amount of the change represented by this range of market prices.

Within the settled law of the State, therefore, an erroneous element was considered in this respect, but even assuming that this market value establishes the value of the total corporate property, of what value is this knowledge as a factor in ascertaining the value of a single segregated item of corporate property? The corporation's property at the time of this alleged assessment, as found by the Referee (p. 212, finding 43), consisted of stocks and bonds of other companies, shown by their report to be worth $5,500,000; real estate outside the streets, assessed the previous year by local assessors at over $9,400,000; mains and pipes in the streets, found by the Referee to be worth $4,908,088; materials and supplies, reported at $314,000 approximately; contracts, patents, good-will and franchises of various kinds including the special franchise. All this property is represented by the share stock. It is not possible to ascertain what proportion of the share stock represents the special franchise or any other single item of corporate property.

It cannot be argued that a deduction from the aggregate market value of the corporate securities as representing the total value of the corporate property, of the value of the real estate, securities of other companies, equipment, and all other tangible property, will give the value of the special franchise. Such a method would be clearly untenable. Even if the market price of securities were a true measure of actual value, the deduction of the value of all the tangible property would leave a remainder which must represent numerous items of intangible property, namely, contracts with customers, patents, good-will and the general franchises of the corporation. There is no method or rule by which this remainder can be apportioned to the different items of intangible property. Any attempt to do so would necessarily be pure guess work and imagination. And, under the laws of

the State, the general franchises and good-will are not taxable for local purposes.

People *ex rel.* Union Trust Company *vs.* Coleman, 126 New York, 437.

People *ex rel.* Steamboat Co. *vs.* Dederick, 25 Miscellaneous Reports, 539; affirmed, 161 New York, 195.

People *ex rel.* Manhattan Ry. Co. *vs.* Barker, 165 N. Y., 305.

People *ex rel.* Nat. S. Co. *vs.* Feitner, 166 N. Y., 129.

The market price of share stock and bonds is not the Commissioners' judgment of the total value of the assets, but the judgment of those who buy and sell these securities in the market. How can the Commissioners tell what value is put by these investors upon the many elements which enter into the market value of the share stock and bonds? How much does the investor regard the good-will worth? How much value does he attach to the corporate franchise? How much is given to the future prospects of the corporation? How much to real estate or to personal assets? How does the financial market affect his judgment? Unless the Tax Commissioners know the investor's opinion of these various elements, they cannot possibly get at the investor's opinion of the value of the special franchise.

As already pointed out, the market value of stocks and bonds includes many things which are intangible, such as the right to be a corporation, the right to transact the business of a gas corporation in The City of New York, the goodwill of the business and the personal elements in the conduct of the business. It is impossible to estimate the money value of these rights, yet, unless this can be done, any consideration of the market value of securities is idle.

The foundation for the error that bonds and stocks were properly considered in determining the value of the special

franchise was probably the decision of this Court in the *State Railroad Tax Cases*, 92 U. S., 575. In that case the State Board of Equalization of Illinois had jurisdiction to assess all the property of the corporation, real, tangible, personal and capital stock. The statute under consideration in that case provided:

> "The capital stock of all companies * * * shall be so valued as * * * to ascertain the fair cash value of such capital stock, including the franchises over and above the assessed value of the tangible property."

It directed the State Board of Equalization to adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it might seem equitable and just. The rule adopted by the Board was first to ascertain the market value of the stocks and bonds, and after deducting therefrom the value of the real estate and the tangible personal property, the balance was held to be the fair value of the capital stock, including the franchise. In considering this rule under this statute this Court held that it was a fair test of the true value of the road, including all its property, its capital stock and franchises. In other words, that the market value of the stocks and bonds represented every element of property and of business prosperity which the corporation possessed.

It is quite obvious, however, that the rule sustained in the case cited has no bearing upon the case at bar. The theory of the Illinois statute was to value—

First—The real estate not a part of the track or right-of-way, and personal property which remained permanently at a given place.

Second—The tracks, right-of-way, depot buildings and all rolling stock and other personal property which was not local; and

Third—The capital stock, which included all the franchises or rights of the corporation.

Over all this property the State Board of Equalization had jurisdiction, and there was one assessment and one tax.

In our case, however, the State Board has jurisdiction over but a single thing, namely, the special franchise. All other property is assessed by other officers, and pays a tax either locally or to the State. The Illinois Board was required to assess the entire intangible property. The New York special franchise act gives the State Board jurisdiction to assess only a single item of intangible property.

The aggregate assets of the corporation furnish no evidence of the value of the special franchise.

A consideration of the actual value of all tangible corporate property, real and personal, or of any separate items of that tangible property, can be of no assistance in reaching the value of the special franchise. To determine the value of the special franchise by a consideration of the total assets of the corporation owning it is like attempting to determine the value of a house and lot by considering the total wealth of its owner. That the real property outside the street is worth $10,000,000 has no tendency to prove what the value to lay pipes in the streets may be worth. The same is true of the consideration of the fact that the relator possesses stock and bonds of other companies worth $5,500,000.

Upon the reasoning already advanced the aggregate value of the tangible property is not useful as a basis of deduction from the aggregate market value of the securities, because the remainder so found would represent a multitude of different intangible properties incapable of separation. Any attempt to value the special franchise by a consideration of other assets of the corporation must be pure conjecture.

The irrelevancy of this consideration of the entire assets and of the market value of securities is disclosed by the fact that while the stock is now selling at $200 or more, in 1884 it sold as low as $80, although no different rights to use the

streets are possessed now by the relator than it then owned (pp. 32 and 31).

The earnings of the corporation furnish no evidence of the value of the special franchise.

The Referee has found (p. 212, finding 44), that the gross earnings of the relator in 1899 were $7,350,685, and that such earnings were derived from the combined use and operation of its entire system and of all its property embraced therein.

The State Board, as shown in the testimony above quoted, considered the earnings as the most important factor in determining the value of the special franchise. But these earnings are the earnings resulting from the operation of all the property of the company as a unit. They are not the earnings of the special franchise alone. There is no method of determining the earnings of the special franchise, or its earning capacity, or what portion of the total gross earnings of the company is derived from the use of the special franchise. The State Board admitted that it was impossible to so apportion the earnings (pp. 75 and 76). The Board admitted that some of the earnings of the company was derived from its gas houses and other real property not connected with the franchise, and that they knew of no way of estimating what part of the company's earnings was derived from such real estate separate from its other property and rights; that a part of the earnings was derived from the franchise to make and sell gas, but that they knew of no way to estimate what part of the earnings was so derived; that a part of the earnings was derived from the company's 103,867 services into buildings, and from the contracts with the owners of such buildings, but that they knew of no way by which the earnings from such services and contracts could be separately estimated; that the relator's franchise to be a corporation and to do business as a gas company was of value to it in making its earnings, but that there was no way by which the earnings therefrom could be separately estimated; that the company derived

some part of its earnings from the good will, but that there was no way known by which the earnings so derived could be separately computed.

The conclusion is obvious that the use of earnings as a factor results in including in the assessment of the special franchise, to some extent, the value of the company's good will, contracts with patrons and with the City, its franchise to make and sell gas, its franchise to be a corporation and of all its tangible property outside the streets, over none of which the State Board had jurisdiction, or that the earnings were arbitrarily apportioned among the various properties and a portion assigned by guesswork and imagination to the special franchise, as representing its earning power. The Referee has found (p. 212, finding 42) that this assessment does not include the value of the good-will or that of the franchise to be a corporation or that of any property other than the special franchise. If this finding were a finding of fact and if it were based on any evidence there would then be no escape from the other alternative, namely, that of an arbitrary apportionment of the earnings. But there is not a scintilla of evidence in the record to support this finding. It is quoted bodily from the return of the State Board (p. 17). This allegation in the return of the Board is in contradiction and denial of allegations in the petition (p. 7) to the effect that the assessment included the value of certain specified items of property other than the special franchise. The allegations in the petition are fully proved by the testimony and admissions of Mr. Priest. The allegations of the return are not conclusive. It is merely a pleading which must be supported by evidence. The proceeding is a new trial of the questions of fact.

People *ex rel.* Manhattan Ry. Co. *vs.* Barker, 152 New York, 417, 431.

People *ex rel.* Grace *vs.* Gray, 45 Hun, 243.

People *ex rel.* Bibb Mfg. Co. *vs.* Wells, 84 Appellate Division, 330.

The defendants in error cannot point to a scintilla of evidence which tends to sustain this finding of the Referee. Due exception was taken to the finding by the relator (page 249, exceptions 6, 7, 8). Neither the Appellate Division nor the Court of Appeals considered the facts, as their opinions show.

And furthermore, a valuation of a single item of corporate property by a consideration of the earnings of the whole corporate property has been universally condemned by the Courts of the State of New York.

In *People* ex rel. *D., L. & W. R. R. Co.* vs. *Clapp*, 152 New York, 490, where assessors tried to find the value of a piece of railroad track within their jurisdiction by considering the earnings of the whole road and then apportioning them, the Court of Appeals pointed out that this involved making an arbitrary allowance for the earnings of terminals, depots and track not within the jurisdiction of the assessors. The Court said (p. 493):

> "The earnings of a railroad include the earnings of the personal property as well as the real estate. It includes the use of its franchises, and the profits of operation may, in many cases, be attributed to the skill or ability in the management. The rentals grow out of all real and personal estate and franchises. *It is simply impossible to apportion the rentals or earnings and credit the just proportion to real estate, to personal property, and to franchises.*"

In *People* ex rel. *Western Union Telegraph Company* vs. *Dolan*, 126 N. Y., 166, a similar ruling was made. The assessment under consideration in that case related to the interest in land upon which the relator's telegraph poles were erected, and the Court at Special Term had held that in arriving at the actual value of the property, the assessors had the right to look beyond the cost of specific material, and to estimate such property not as an isolated piece of land, but in connection with its position, its incidents and the business and profits to be derived therefrom. In reference

to this rule the Court of Appeals, per Peckham, *J.*, said (p. 177):

> "Taking the cost of the production of those articles which are in their nature personal property, and capable of infinite production, as above described, and adding to that cost the value of the interest in the land on which the poles stand, and the value of the right to erect such poles on the land, upon the principles above indicated, and we have the total elements entering into the full and true value of the property of the company subject to taxation under the act of 1886, above cited. In the assessment for taxation under that act, the property is not to be regarded as a part of a whole, nor as a complete telegraph line in operation. Its value for telegraph purposes, and its position with its connections and its productive capacity, are not considerations entering into the value of the property under the act last named. These considerations are foreign to its purpose. They largely enter into the question of the value of the business and the franchises of the company, and the value of such business and franchises is to be assessed under the act of 1881, already quoted. If it were not for that act and its provisions for assessing the value of the business and franchises of telegraph companies for the purposes of taxation, it may be that courts would strive to give a wider meaning, if possible, to the range of the act of 1886, for the purpose of reaching these subjects of taxation. But when they are already taxed under a separate act it cannot be supposed that the Legislature intended to tax them again in every tax locality in the State."

In *People* ex rel. *Panama R. R. Co.* vs. *Commissioners*, 104 New York, 240, the Court said (p. 246):

> "Since the income is derived from the use of its real and personal property and also of its franchise, it is manifestly quite impossible to ascertain, from proof of the

income alone, the value of either element entering into the aggrogate value of the corporate property."

In *People* ex rel. *Delaware and Hudson Canal Company* vs. *Ganley*, 29 State Reporter, 130, which was a certiorari to reduce an assessment upon railroad tracks, Judge Fish, who heard the case at Special Term, said (p. 131):

> The fact that the earnings of the company are large does not increase the value of the real estate beyond what it would cost to buy and build the road. * * * The net earnings grow out of a good many combined quantities: (1) the use of tracks, depot buildings, terminal grounds, warehouses and work shops; (2) the use of the personalty, in the way of engines, cars, machinery and tools, and implements necessary to its management; (3) the energy and business capacity of its management; (4) the authority given by its franchise to levy prices of transporting freight and passengers. * * * Suppose we bring in the question of the net earnings of the road, who can determine: (1) How much of it is due to the real estate? (2) How much to the rolling stock and personal property in use? (3) How much to the franchise? (4) How much to the efficiency and personal influence of the management and other incidental causes?"

In affirming the order of the Special Term in that case Judge Learned said at the General Term (129 St. Rep., 135):

> "It is by no means a fair mode of estimating the value of a piece of land to ascertain the net profits which are made upon it or by means, in part, of its use For instance, the net amount of profits made in awyer's office would not be any, or at least very little, evidence of the value of the office as real estate."

This decision was affirmed by the Court of Appeals on the opinion below (131 N. Y., 566).

See also

Matter of Gilroy, 26 Appellate Division, 314.
City of Syracuse *cs.* Stacey, 45 Appellate Div., 249, 259; affirmed 169 New York, 231.

The *State Tax Cases*, 92 U. S., 575 and *Pittsburg Railroad Company* vs. *Backus*, 154 U. S., 421, are not adverse to the principles stated by the New York Courts above quoted, since in those cases before this Court the assessors had jurisdiction over all of the property of the corporation within the State, including its franchises, and had power to deal with every element of value possessed by the corporation. The jurisdiction of the State Board of Tax Commissioners under the special franchise act is confined to a single piece of property.

The foregoing cases fully establish the impossibility of determining the value of the special franchise upon the basis of earnings, and that such a method is essentially and necessarily arbitrary and illegal.

B.

THERE WAS NO EVIDENCE IN THE CASE FROM WHICH THE VALUE OF RELATOR'S SPECIAL FRANCHISE COULD BE ASCERTAINED.

The writ of certiorari (p. 12) required the State Board to certify and return to the Court all the evidence and information before the Board, or considered by it in arriving at its decision. The only evidence specified in the return consists of the reports and other documents filed by the company (p. 14, par. IV., V.). The return alleges (p. 15, par. VII.) that said Board had "certain facts and information other than those communicated to the Board on behalf of the relator"; that the Board, through its agents, had inquired and investigated as to the value of the relator's special franchise, it being impracticable for the members of the Board to make a personal examination of the relator's property, and that these agents had formed opinions as to the value. The re-

turn then showed that the Board had before it also the capital stock assessment and the assessment of real property in the streets (*i. e.*, mains and pipes) of the relator in the previous year. The return also states (par. VII.) that "among other things respondents ascertained that the relator had heretofore claimed the value of its franchise to be upwards of $7,000,000." It was explained by testimony (pp. 26 to 28) that this $7,000,000 item was the amount allowed in the original organization of the relator for the value of the good-will, patents, contracts and general franchises of the consolidated companies in 1884, and did not refer solely to the franchise to use the streets, and counsel for the State Board thereupon abandoned their claim that this item represented a value assigned by the relator to its special franchise. The return again alleges (p. 17, par. X)

> "That such assessment * * * has been arrived at upon consideration of all the facts and circumstances affecting the value of said property * * * which your respondents have been able to ascertain."

The foregoing matters were certified by the State Board as embracing all the evidence before it. The allegation of the return that there was investigation by the Board's agents, who formed opinions as to the value, if it could have any effect whatever, would be equivalent to an allegation that the State Tax Commissioners had delegated their quasi-judicial powers to others, and that these unnamed agents and not the Commissioners themselves had determined the assessment. Such an assessment would be void.

Lee *vs.* Parry, 4 Denio, 125.
Doughty *vs.* Hope, 3 Denio, 594.
Powell *vs.* Tuttle, 3 New York, 396.
People *vs.* Supervisors, 11 New York, 563.
Middletown, *vs.* Berlin, 18 Conn., 189.
Woodman *vs.* Auditor General, 52 Mich., 28.
People *vs.* Hastings, 29 Cal., 449.

But these allegations and also the later allegations that the assessment was made from examination, investigation and inquiry by and on behalf of said Board had no effect whatever in the return. The writ requires the return of all the evidence before the Board, and it is the well settled law of the State that the taxing officers cannot sustain an erroneous assessment by alleging that there was other evidence which it does not produce.

In People *ex rel.* Edison Electric Illuminating Company *vs.* Barker, 139 New York, 55, in a certiorari proceeding to review the assessment of capital stock, the defendants, New York City Commissioners of Taxes, disclosed in their return no evidence other than that submitted in the company's report. The Court said, per Peckham, *J.* (p. 62):

> "The Commissioners cannot, under such circumstances, avoid the legal effect of the information thus given by stating in a return to a writ of certiorari that they had made 'due inquiry as to the value of the capital owned by the relator,' and had come to a certain decision in regard to it. If they made inquiries other than the questions contained in the written statement, and upon which they acted, they should, when required by the terms of the writ of certiorari, give the Court some information as to the nature, extent and direction of such inquiries, and they should state what the information was which they obtained and upon which they based their decision. Otherwise the Commissioners might always return that they had made 'due inquiry' and had come to a certain decision, and the Court would be powerless to give relief nothwithstanding the decision might be clearly against the evidence which was sworn to and uncontradicted on the part of the applicant, and, if believed, entirely sufficient to warrant and demand the correction claimed by such applicant."

The return in this case does not disclose the nature of the information which resulted from the alleged inquiries, or even

state what the opinions formed by their investigating agents were. It may well be that this special franchise has been valued by the Commissioners at a larger sum than that which it was worth in the opinions of their agents.

The State Board admits in its return that the members of the Board had no personal knowledge of these special franchises and made no personal examination thereof (p. 15, para. VII.).

Upon the return therefore the facts and figures contained in the reports and documents submitted by the relator were the only evidence before the Commissioners.

The reports and documents filed by the relator, to which the return refers, in part follow the return in the record, and the remainder are printed in the record as exhibits (pp. 149 to 164). These documents contain merely reports of the previous year of the capital stock and funded debt of the relator, its assets and liabilities, market quotations of stock and bonds, dividends paid, receipts and disbursements, the value of tangible real property in the streets included in the special franchise, the last assessment of real property in the streets and of the real property outside the streets by the New York City assessors, pipe mileage, and description and sizes of the mains and pipes used.

While these figures give some information which would assist in the determination of the value of the pipes and mains in the streets, they do not constitute or furnish in the slightest degree evidence of the value of intangible element of the special franchise—the right to lay and maintain pipes in the streets. It is not possible to imagine how any person could derive any valuation for the special franchise from these figures without the most violent and arbitrary assumptions. No better or additional evidence was produced before the Referee. The president of the relator testified concerning the organization of the corporation in 1884 and as to the organization of its constituent companies and the laws under

which they were formed, and their certificates of incorporation were introduced in evidence (pp. 164, 187). He testified also as to the value of the mains and pipes in the streets (pp. 24 to 29). Counsel for the State Board in cross-examining the president sought to bring out merely the market value of the company's stocks and bonds (pp. 29 to 34), the net earnings of the company (pp. 34 to 37), and the value of various items of the corporation's tangible property (pp. 37 to 46), all of which matters were contained in the reports of the relator returned by the State Board.

Alten S. Miller, for the relator, testified (pp. 47 to 50) as to various matters regarding the New Amsterdam Gas Company, none of which related to the value of the relator's franchise. Colin C. Simpson testified briefly (p. 50) as to the relator's pipes in the streets.

The Chairman of the State Board was then examined at length (pp. 51 to 82) by the relators in an endeavor to learn the principle or method upon which the State Board reached this valuation, and his testimony, which has been heretofore discussed, was limited to the methods pursued by the Board.

The remainder of the record (pp. 82 to 148) contains evidence only upon the question of the proportion or percentage of the full value at which real property in The City of New York was assessed. It was upon this evidence that the Referee found that the assessment of all other real estate in New York City was 67 per cent. of its full value and reduced the relator's assessment 33 per cent. to equalize it with that of other property in New York City.

There was, therefore, no new matter presented before the Referee having any bearing upon the value of the intangible element of the special franchise, and there is consequently absolutely nothing in the record, except the reports of the relator, by which the defendant in error can even pretend to justify the assessment. The figures contained in these reports tend to establish only three facts outside the value of

the tangible property in the streets used in connection with the special franchise, the assessment of which we do not here dispute, namely, the gross and net earnings of the corporation, the itemized and total value of the tangible assets of the corporation, and the amount and market price of the outstanding bonds and share stock. No other fact can be deduced from these reports. But none of these three facts, as we have endeavored to show in the preceding point, has the slightest tendency to show the value of the special franchise or has any relevancy upon that question. And the conclusion is inevitable that the State Board upon the evidence before it could not have arrived at any assessment or valuation of the relator's special franchise, and that it was equally impossible for the Referee, having no better or other evidence before him, to determine the value of the special franchise or to justify the determination made by the State Board.

C

THIS COURT MAY MAKE THE EXAMINATION OF THE EVIDENCE REQUIRED BY THE FOREGOING DISCUSSION.

We do not in the preceding discussion invite the Court's attention to the facts and evidence for the purpose of reviewing any conflicting evidence or inquiring whether the findings of the Court are contrary to the weight of evidence. Such a review or inquiry we concede is not open to this Court on writ of error to a state court. There is no conflict of evidence whatever in this case.

But the referee here held (p. 212, finding 45) that "the actual and true value of the special franchise of the relator as finally determined by the defendants, and as I find was $13,950,000, and no evidence was given before me to show that it was less." We ask the Court to examine the brief and unconflicting evidence in this case and determine whether any of that evidence was relevant or competent to prove the value of the special franchise. We insist that there was no fact before the State Board upon its own admission or before

the Referee which had the slightest tendency to prove the value of a special franchise, or from which such a value could possibly be ascertained.

This question the Court can undoubtedly examine.

In Dower *vs.* Richards, 151 U. S., 658, 667, this Court said:

> "When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this Court."

The State Board of Tax Commissioners has fixed a sum which it designates as the value of the special franchise, and has produced the evidence upon which it claims to have reached its determination. We insist that the determination was not a valuation, and the contention is established as true, and the alleged assessment branded as arbitrary and fictitious by a consideration of the evidence produced before the Referee since no value could possibly have been found therefrom.

That there is no evidence to support a finding of fact presents a question of law, and errors alleged in the findings of the Court below are subject to revision by this Court, provided there there was no evidence upon which such findings could be made.

Merchants' Ins. Co. *vs.* Allen, 121 U. S., 67, 71.
The Francis Wright, 105 U. S., 381, 387.
The City of New York, 147 U. S., 72, 77.
Dooley *vs.* Pease, 180 U. S, 126, 132.
Runkle *vs.* Burnham, 153 U. S., 216, 225.
Hathaway *vs.* Cambridge Bank, 134 U. S., 494, 498.

The power of this Court in this respect upon writ of error is the same whether the writ runs to a State Court or to an inferior Federal Court.

Section 709, United States Revised Statutes.

The finding of the Referee that the amount of the State Board's assessment is the actual value of relator's special franchise was based upon the failure of the relator to prove that the actual value was less (page 212, Finding 45; Opinion, pages 241, 242). The relator was as powerless to show the actual value of its special franchise as was the State Board, since the value was not capable of direct proof. But the relator is not limited in its attack upon the assessment to proof of an overvaluation. It is the settled law of the State that the assessment may be shown to be erroneous in two ways, first, by proof that the valuation of the assessors is excessive; second, by proof that the method adopted of ascertaining the value of the property assessed was an erroneous one. A presumption exists at the outset in favor of the correctness of an assessment, but that presumption is destroyed either by proof of the true value of the property, or by showing that some erroneous method has been adopted, or arbitrary assumptions made or improper elements of valuation taken into account.

People *ex rel.* N. Y. C. & H. R. R. R. Co. *vs.* Morgan, 168 N. Y., 1.

People *ex rel.* Edison Electric Illuminating Co. *vs.* Barker, 139 N. Y., 55, 66.

People *ex rel.* Union Trust Co. *vs.* Coleman, 126 N. Y., 433.

People *ex rel.* Manhattan Railway Co. *vs.* Barker, 146 N. Y., 304.

People *ex rel.* Cornell Steamboat Co. *vs.* Dederick, 161 N. Y., 195.

People *ex rel.* D., L. & W. R. R. Co. *vs.* Clapp, 152 N. Y., 490.

In this case any presumption of the correctness of the assessment was fully rebutted by proof that the assessment was founded wholly upon considerations and facts which had no tendency whatever to establish the value of the special franchise, and that there was no evidence before the respondents upon which they could have properly determined the value of the special franchise.

If the jurisdiction of this Court can be defeated by an unauthorized finding that the amount assessed is the true value, a convenient method will be furnished whereby the review of this Court of any State taxation question can be prevented, however gross the fraud or illegal the act of the assessing officers. Why might not the State Board assess the relator's special franchise at a billion dollars instead of fourteen millions, if the inability of the relator to prove its actual value would support a finding by the Court that the State Board's valuation is correct, and if this finding could bar all review?

D

There is no method by which the value of a special franchise of a gas company can be ascertained.

Plaintiff-in-error does not desire to escape taxation altogether upon its special franchise. Is does not contend that the right to occupy the streets possessed by it cannot be assessed for taxation by the City or State. But it does contend that no valid assessment can be made under the act of 1899. Taxation of this peculiar species of property can be accomplished legally only by some act of the Legislature establishing just and rational principles upon which the assessment shall be made and insuring equality and uniformity in its operation. The present law commits to the State Board of Tax Commisssioners an unlimited and arbitrary power to determine the principles, method and basis of the assessment. Since the law declares the special franchise to be real

property, it might be presumed that these franchises were intended to be assessed and valued like other real property. But the nature of the property does not admit of its treatment by the assessors as land or buildings. It is not susceptible of a general and separate valuation.

The usual tests of the value of property are: Its market value, the cost of procuring it, and its earning capacity. None of these tests is applicable to the intangible right to lay pipes in the streets.

It is common knowledge that such rights and franchises are not bought and sold and that they have, therefore, no market value.

Neither is it possible to ascertain the cost of procuring such a right as a criterion of its value. In People *ex rel.* Western Union Telegraph Co. *vs.* Dolan, 126 N. Y., 166, under an act providing for the taxation of telegraph lines as real estate and declaring that the assessment of such lines should include the interest in the lands on which the poles were erected, it was held that the interest in the land being a license which might be obtained by any other company, the cost of procuring it was a correct criterion of its value. But in the case of gas franchises in The City of New York there exists no known cost of acquisition. Such franchises have almost invariably been granted without payment of any consideration therefor. If it were proper to speculate upon the amount which the City or State would or could demand and obtain for such a right, it is impossible to imagine that the authorities could exact from any applicant for such privileges the vast sums represented by the special franchise assessments made by the State Board. An exclusive franchise by which a public service corporation obtains for an indefinite time a monopoly of the use of the streets for any purpose may be of very great value. This relator, however, possesses no exclusive right to lay pipes and mains in the streets of New York for conducting gas. As has been previously indicated, several other companies, each possessing co-extensive

rights, are engaged in the same business in New York. The franchise of a railroad company to lay its tracks in certain streets is in its nature in many cases an exclusive franchise, because the width of the street will not admit of the enjoyment of two such franchises. But the franchise of a gas company is not limited to the same extent. Such franchises are capable of considerable multiplication. There is no restriction upon the number of such franchises which may be granted by the authorities. No purchaser thereof acquires a monopoly; others possess identical franchises, and still other identical franchises may be at any time created. No purchaser of such a franchise could, therefore, afford to pay more than a nominal sum for its acquisition.

It has already been shown that the earnings derived by the company from the operation of its entire system have no tendency to prove the value of the special franchise. There are several additional considerations which peculiarly affect the earnings of a gas company. Conditions of competition are important considerations. The owner of a gas franchise may, in the absence of any competition, derive large profits by means of its street franchise, but if its mains are paralleled by those of a competitor, the profits of the first occupant may be halved. All gas franchises are held and operated subject to the power of the Legislature to control the price of gas. The manner and extent of the exercise of this power determine the earnings of the gas company. It is within the power of the Legislature to reduce the earnings to an amount so small that the business cannot be profitably conducted. These considerations all affect vitally the earnings of a gas company, but do not affect the intrinsic value of the franchise. The consideration of earnings as a criterion of the value of a gas company's special franchise is, therefore, erroneous. The value of a franchise like that of any other property cannot be said to fluctuate as conditions of competition and legislative control vary.

The usual tests of property value are, therefore, all inapplicable to a special franchise.

POINT FOUR.

Because there never was any real valuation of this franchise, never any basis established for that apportionment of burdens which is essential to lawful taxation, the pretended tax complained of is a perfectly arbitrary and unlawful exaction.

The identical franchise which was assessed to the Consolidated Gas Company, excluding tangible property, at $9,000,000, and to the Mutual Company, including tangible property, at $2,000,000, and to the Standard Company, including tangible property, at $3,000,000 and to the New Amsterdam Company, including tangible property, at $4,000,000, was plainly not really valued at all. The real question determined was what the company could stand, not what the franchise was worth.

We disclaim the idea that this Court should reverse the judgment of the State Court for any mere error, however great the injustice, but we submit that there should be a reversal here because there was an entire absence of any real basis of apportionment.

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